TABLE OF AUTHORITIES

Cases:	Page
Cardinale v. Louisiana, 394 U.S. 437, (1969)	6
Reed v. Reed, 92 C.Ct. 251, (1971)	9
Skinner v. State of Oklahoma, 316 U.S. 535 (1942)	10,12
Van Vactor v. State, 247 Ind. 288, 215 N.E.2d 196 (1966)	4
Williams v. State, ____ Ind. ____, 256 N.E.2d 913 (1970)	13
Constitutional Provisions	
United States Constitution, Amendment 14.	1 ,5
Indiana Constitution, Art. 4, §22	5
Statutes	
Indiana Code of 1971, 35-1-42-2, as found in Ind.Ann.Stat. (Burns' 1956 Repl.) §9-2001	4

Statutes | Page

Indiana Code of 1971, 35-30-1-1, as found in Ind.Ann.Stat. (Burns'1971 Supp.) §10-4220 6,7

Indiana Code of 1971, 35-30-6-1, as found in Ind.Ann. Stat. (Burns' 1971 Supp.) §10-4226 8

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1971

NO. 71-1427

MAE WILSON,	)
	)
Petitioner,	)
	)
-vs-	)
	)
STATE OF INDIANA,	)
	)
Respondent.	)

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Whether the Indiana statute prohibiting prostitution violates the equal protection provision of the Fourteenth Amendment to the United States Constitution in that the statute applies only to females.

STATEMENT OF THE CASE

The petitioner's Statement of the Case is correct except that the State disputes that the federal constitutional issue was properly presented to the Indiana courts.

The federal constitutional issue was presented to the trial court through a Motion in Arrest of Judgment, but that motion was not timely filed. No federal constitutional issue was presented to the Supreme Court of Indiana.

The Statement of the Case also fails to set out the facts of the case which are as follows:

On July 10, 1969, a vice squad officer of the Indianapolis Police Department was driving on a public street in an unmarked car when the petitioner,

standing on the sidewalk, signaled him to stop. When he did, she asked him if he wanted a date and to spend $10.00. They went to her apartment nearby and further discussion showed that the ten dollars was to be payment for sexual intercourse.

ARGUMENT

THE INDIANA STATUTE IS CONSTITUTIONAL

The reason for the alleged unconstitutionality of the Indiana statute is that it differentiates between males and females. It is the submission of the State of Indiana that the classification used by the statute is a reasonable one. As a preliminary matter, though, it must be noted that the issue was not properly presented to the Indiana Courts.

As shown in the petitioner's Statement of the Case (Pet. for Writ, pp. 3-4), petitioner was found guilty of the offense on May 18, 1970, and was sentenced (judgment entered) on May 28, 1970. On July 23, 1970, nearly two months later, a Motion in Arrest of Judgment was filed raising the federal constitutional issue. That motion was not timely because Indiana law requires that it be filed prior to entry of Judgment. Indiana Code of 1971, 35-1-42-2, as found in Ind. Ann. Stat. (Burns' 1956 Repl.) §9-2001; Van Vactor v. State, 247 Ind. 288, 215 N.E.2d 196(1966). The Supreme Court of Indiana did not rule on this issue of timeliness, but decided on the merits the issue presented to it. That issue, though, was a different issue. While petitioner raises in this Court an issue

arising under the Fourteenth Amendment to the United States Constitution, which was the issue raised in the trial court, the argument to the Indiana Supreme Court raised no federal constitutional issue.

The issue argued to and decided by the Supreme Court of Indiana was whether the statute violated Article 4, §22 of the Indiana Constitution, which provides in relevant part:

> "The General Assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say:
>
> [2] For the punishment of crimes and misdemeanors."

There appear to be certain similarities in the manner cases are analyzed in the application of this Indiana provision and the equal protection provision.

Both often speak of whether a classification is reasonable. But this similarity need not mean that the issues are the same or that the same standard apply.

The federal constitutional claim was not presented to the Supreme Court of Indiana. Thus, the Petition for Writ of Certiorari presents nothing to this Court, as this Court has previously held that it will not consider these cases. Cardinale v. Louisiana, 394 U.S. 437 (1969).

Were the issue properly before the Court for consideration, the result should still be denial of the writ. The specific charge under the Indiana statute is that petitioner is a female who offered to commit an act of sexual intercourse for hire. This is one of several related practices prohibited by Indiana Code of 1971, 35-30-1-1, as

found in Ind.Ann. Stat. (Burns' 1971 Supp.) §10-4220, which is as follows:

> "Any female who frequents or lives in a house or houses of ill fame, knowing the same to be a house of ill fame, or who commits or offers to commit one [1] or more acts of sexual intercourse or sodomy for hire, shall be deemed guilty of prostitution, and on conviction thereof shall either be fined not less than one hundred dollars ($100) nor more than five hundred dollars ($500); and imprisonment not to exceed 180 days or such person may be imprisoned in the Indiana women's prison not less than two [2] years nor more than five [5] years."

Petitioner's claim is that the act of offering to commit sexual intercourse for hire is made a criminal offense for women, but not for men, and that this classification is improper. The State of Indiana does not admit that the

specific act charged, i.e. the offer to commit an act of sexual intercourse for hire, is unlawful only for females and not for males.

While there is no statute using similar language prohibiting such activities by males, such activity might be considered within the scope of the pandering statute, which provides in relevant part:

> "Any person who shall, directly or indirectly, take, receive or accept money or other thing of value for providing, procuring or furnishing for another any person for the purpose of illicit sexual intercourse, shall be guilty of pandering. Indiana Code of 1971, 35-30-6-1, as found in Ind. Ann. Stat. [Burns; 1971 Supp.] §10-4226.

Procuring is defined as making available. The underlined words

"any person" would in a strict sense include the procurer himself, and this statute does not make any classification by sex. This language has not been construed by the Indiana courts, but would appear to be applicable.

The State of Indiana further submits that, in any event, such a classfication is reasonable and sex can be a relevant factor in sexual relationships. Petitioner relies primarily on Reed v. Reed, 92 S.Ct. 251 (1971), which holds that a sexual classification is improper for determining entitlement for appointment as administrator of a decedent's estate. That case does not hold that sex can never be a proper criterion; it merely holds that the criterion must be related to the

objective of the statute. Sex is related to the control of sexual activities. That difference is not only one of physiology, but also of social practices.

> "Under our constitutional system the States in determining the reach and scope of particular legislation need not provide 'abstract symmetry.' *** They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. *** It was in that connection that Mr. Justice Holmes... stated, 'We must remember that the machinery of government would not work if it were not allowed a little play in its joints.' Only recently we reaffirmed the view that the equal protection clause does not prevent the legislature from recognizing 'degrees of evil'..." Skinner v. State of Oklahoma, 316 U.S. 535, 539-540 (1942). [citations omitted; emphasis added.]

The evil sought to be presented by the particular prohibition involved in this case is the accosting of passers-by or other persons encountered in casual contacts with an offer to commit sexual intercourse for hire. The petitioner apparently does not deny that this activity is one which may properly be prohibited, but argues only the classification by sex.

The State of Indiana submits that by reason of the sexual mores of our society, which are based on physiological functions and social structures, the legislature might reasonably have determined that the evil to be prohibited ordinarily occurs in the context of the accosting of a male by a female. In that context of the mores of life in

Indiana, this classification might then have been instituted "according to the needs and as dictated or suggested by experience." Skinner v. Oklahoma, supra.

Since the equal protection issue was not presented to the Supreme Court of Indiana, no determination was made as to that issue. That Court did state, though, in adopting the language of an earlier Indiana decision:

> "The classification as made is founded on substantial distinctions in the subject matter. It is reasonably designed to protect the morals and welfare of the public." (Pet. for Writ. p. 11).

Under Indiana law, the court may take judicial notice of such social mores. As the Indiana court has stated in a prior case arising under this same statute:

"This Court should not be ignorant as judges of what we know as men." Williams v. State, ____ Ind. ____, 256 N.E.2d 913, 914 (1970).

It is thus the submission of the State of Indiana that the statutory classification, even if the issue were properly before the Court is reasonable and proper so as not to be a denial of equal protection of the law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted

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